Supreme Court of the United States

REPLY BRIEF FOR PETITIONER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 472

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*

v.

MICHIGAN CONSOLIDATED GAS COMPANY,
MICHIGAN WISCONSIN PIPE LINE COMPANY,
AMERICAN LOUISIANA PIPE LINE COMPANY,
COUNTY OF WAYNE, MICHIGAN,
MILWAUKEE GAS LIGHT COMPANY,
WISCONSIN FUEL AND LIGHT COMPANY,
NATIONAL GAS DISTRIBUTORS, INC.,
STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN,
CITY OF DETROIT,
WISCONSIN PUBLIC SERVICE CORPORATION,

Respondents

REPLY BRIEF FOR PETITIONER

The single brief in opposition, filed by the American Natural Gas Company's wholly-owned subsidiaries, urges that the unprecedented action of the court below should not be examined on certiorari

by this Court because of the "special circumstances" of this case. In this, Respondents are mistaken, because the issues presented relate to jurisdictional questions, the recurrence of which is assured by the action of the court below.

There is no circumstance in this case which could justify the court below in requiring the Federal Power Commission to act in a manner which exceeds the Commission's jurisdictional powers. There is also no circumstance in this case which could justify the court below in exceeding its own statutory jurisdiction. And, there is no circumstance unique to this case which can preclude administrative agencies generally from being restrained in the same fashion by these respondents, now that the new technique has been sanctioned by the court below.

Clearly, there is no limitation on the general applicability of the holding of the court below that the Commission's finding as to the crucial issue of "greater need" for gas, even though "unassailable", need not be given effect by a reviewing court solely because it had been advanced in a rehearing order, "after the Commission's original decision" (Pet. App. 24a).

Equally general in nature is the ruling of the court below that, despite specific statutory restrictions upon the time within which an issue can be raised on rehearing of an agency order, the agency may nevertheless be reversed for failing to deal exhaustively with an untimely request for drastic modification of its final order.

The generality of these departures from traditional observance of jurisdictional limitations is signalled by the concluding paragraph of the July 11, 1963 opinion

of the court below, which summarizes the matter in the following terms (Pet. App. 57a):

> "Where, as here, a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration. These limits are not to be confused with the narrower ones governing review of an agency's conclusions reached upon proper consideration of the relevant factors."

This undisguised attack on the expertise of the Commission sanctions a judicial review sufficiently elastic to authorize the nullification of any agency action that does not precisely accord with the particular views of a panel of the Court of Appeals. In this case the judicial review appears "broad" enough to hurdle even jurisdictional limits imposed by Congress. Thus, the sweeping nature of the court's rulings can in no sense be limited to the "special circumstances" of this case.

Respondent's brief in opposition makes no real attempt to defend the basis upon which the court below disregarded the jurisdictional limitation upon the time within which an issue must be presented to the Commission on rehearing. Respondents argue instead that their untimely proposal, which the court below has now ordered the Commission to set for hearing, "was not an attack upon the Commission's December 19, 1958 abandonment order and did not constitute an 'objection to the order of the Commission' which must be urged in an application for rehearing under Section 19(b) of the Act." (Resp. Br. 15).

The invalidity of this argument is readily apparent. The controlling paragraph of the Commission's December 19, 1958 order provided that:

> "(A) Panhandle is hereby permitted to abandon service to Michigan Consolidated and any facilities used to effect such service on March 15, 1959" (Pet. App. 52a).

As opposed to this, Respondent's untimely settlement proposal, specifically called upon the Commission to "*modify* its order of December 19, 1958 to provide as follows":

> "(A) Panhandle is hereby permitted to abandon its deliveries of 127,000 Mcf per day to Michigan Consolidated under Panhandle's S-3 Rate Schedule on October 1, 1959, subject to the condition that Panhandle on October 1, 1959 commences the delivery to Michigan Consolidated of 46,355,000 Mcf per year under Panhandle's S-3 Rate Schedule pursuant to a service agreement which will be prescribed by further order of the Commission following the hearing hereinafter ordered." (J. App. 2379).

Since the entire quantity of gas that Panhandle formerly delivered to Michigan Consolidated amounted to 46,355,000 Mcf per year, all of which was ordered abandoned, it is obvious that Michigan Consolidated's proposal to "modify" the order to require continuation of deliveries in the exact amount of 46,355,000 Mcf per year was, in fact, as complete an attack upon the Commission's order as may be imagined. Since this attack was admittedly not filed with the Commission within the statutory thirty-day period, it could not serve as a ground for the Commission to "abrogate or modify its order," within the contemplation of

Section 19(a) of the Natural Gas Act. Nor could it, because of the prohibition in Section 19(b) of the Act, properly be considered by the court below.

With regard to the other basis upon which the Commission has been directed to conduct further hearings, namely the question of "greater need," Respondents simply beg the question presented by Petitioner. The fact that the court below was not persuaded by the comparative "space heating saturation" test which the Commission discussed in its original order does not constitute justification for disregarding the independent "capacity-demand" test on which the Commission's order on rehearing was based.

Moreover, Respondents now accept the premise "that based upon relative space heating saturations Panhandle's customers needed the gas more than Michigan Consolidated during peak periods in the winter" (Res. Br. 11). Accordingly, it is impossible to see how they can at the same time urge that the greater need of the Panhandle customers was not sufficiently demonstrated.

Finally, Respondents argue that the grant of certiorari "would be merely to delay the effective

[1] Respondents further argue that the "proposal" was intended to comply with the Commission's request for submission of plans for the distribution of the abandonment gas among Panhandle's customers. (Res. Br. 15). Clearly, this was not the fact, because no gas could have been made available to Panhandle's customers under the Michigan Consolidated proposal since it proposed to resell the entire 16,555,000 Mcf available for distribution and instead of proposing a plan for distribution among the various Panhandle customers, Michigan Consolidated's pleading merely stated that "This, of course, is a matter for the Commission to consider." J. App. 237).

resolution of this matter, which is even now before the Commission for its determination upon the remand" (Res. Br. 13). This is misleading. The exact status of the matter is that (1) Panhandle is delivering no gas to Michigan Consolidated since all of the gas is being supplied to the Panhandle customers which were found by the Commission to have the greater need, and (2) no hearings have been held, or even scheduled, by the Commission.

The need for further hearings would be completely eliminated if this Court were to grant certiorari and subsequently rule in Petitioner's favor on the specific points raised.

The record already contains complete data with respect to space heating saturations, as Michigan Consolidated itself admits (J. App. 2380). The competitive claim for service to the so-called "new communities" in Wisconsin is now academic, inasmuch as that service was commenced earlier this year from gas which the American Natural system obtained from new sources in Canada. And, with regard to the need for subsidiary findings to support the Commission's conclusion as to the advantages of separating the two systems, the court below specifically recognized that the Commission "may have an expert's knowledge that does not require evidence in the record that each system will be more efficient and stronger after abandonment" (Pet. App. 31a).

[1] It must be emphasized that the proceedings before the Commission required 94 days of hearings, during which the transcript of testimony alone reached 20,000 pages, with hundreds of exhibits and thousands of pages of pleadings. Unless modified, the orders of the court below would require retracing of this entire process.

The proper resolution of the issues presented in this Court will, therefore, lead to an expeditious conclusion of this litigation, which affects the gas supplies of consumers in a large segment of the midwest, extending from Kansas to Ohio. It will also avoid perpetuation of the far-reaching impact upon the administrative process of the rulings of the court below.

Respectfully submitted.

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